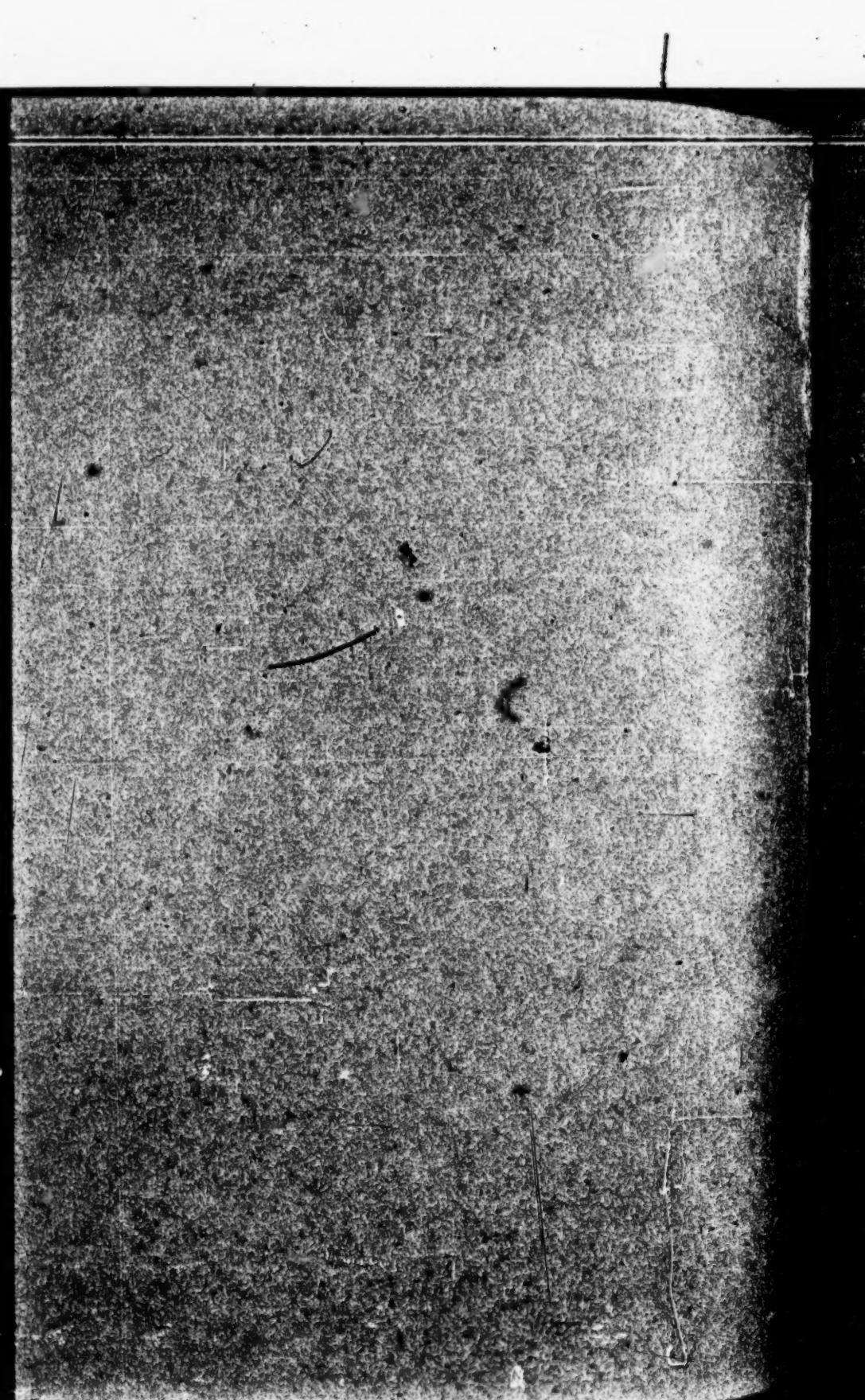

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Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 521.

STEAMSHIP "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, CLAIMANT,

Petitioner,

against

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

HOMER L. LOOMIS,
Counsel for Petitioner.

HOMER L. LOOMIS,
REGINALD B. WILLIAMS,
On the Brief.

Law Print Shop Publishing Office, Inc., 154 Fulton St., New York, N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 521.

Steamship "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant,
Petitioner,
AGAINST
THE RHEINSTROM BROTHERS COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER.

POINT I.

Section 1 of the Harter Act is merely a declaration of the common law and adds nothing for consideration on the question of the validity of the clause.

Respondent in Point I of its brief invokes Section 1 of the Harter Act (U. S. Code, Title 46, Sec. 190) as establishing the invalidity of clause "Eleventh" of petitioner's bill of lading. This is the first suggestion in the course of the litigation that the Harter Act as such had any additional bearing on the question here presented.

The section is obviously simply declaratory of the common law. The Harter Act adds nothing to, but rather relaxes, the rigor of the rule theretofore stated by the courts relative to stipulations against negligence. Such in

substance was the conclusion stated in *Knott* v. *Botany Mills*, 179 U. S. 69, 71, 76. In that case this Court, after pointing out at page 71 the rule prevailing prior to the act, which prohibited carriers by land or sea from exempting themselves from liability for negligence, held at page 76 that, while a foreign vessel was entitled to enjoy the benefits of Section 3 of the Harter Act, no reason had been suggested why such vessel should not also be subject to the "prohibition of the *first* section *affirming* the unlawfulness of stipulations against liability for negligence" (Italics supplied).

It would seem clear, therefore, that Section 1 of the Harter Act, as simply an affirmance of the common law rule relative to stipulations against negligence, has no additional bearing and sheds no additional light on the question whether clause Eleventh of the Petitioner's bills of lading is invalid.

POINT II.

The clause is reasonable and so not contrary to public policy and does not require the proffer of an alternative freight rate to make it valid.

The argument of respondent in Points II and III, as we understand it, may be thus summarized: The clause is unreasonable and against public policy, and even if reasonable is invalid because the shipper was not proffered an alternative freight rate. Respondent's argument that the clause is unreasonable and offends against public policy is predicated primarily upon the claim that the clause exempts the carrier from its negligence. The premise, however, is entirely assumed. And with the possible exception of some half dozen state court cases cited, only two of which are quoted from, and which we shall consider later, respondent has cited no case,

either state or federal, in support of it, although it has quoted liberally from cases that we have considered in our main brief and dismissed as without bearing or as not inconsistent with the cases holding the clause valid. As we shall soon briefly point out, the great weight of authority both state and federal hold that clauses similar in character to clause Eleventh do not exempt the carrier from its negligence, but simply provide a measure of damages where loss occurs and are not unreasonable or against public policy.

It is true that this agreed measure is different from the common law measure in that it makes invoice value plus expenses instead of market value at destination, the standard for measuring loss. As said in *St. Johns N. F. Shipping Corp.* v. *Companhia Geral, etc.*, 263 U. S. 119, 125, "*Generally*, the measure of damages for loss of goods by carrier * * * is their value at destination" (Italics supplied). However, as pointed out in Hutchinson on Carriers, Vol. 3, Sec. 1360, one of the authorities cited by the court in support of this rule, such measure is "by no means an inflexible rule" (*id.* Sec. 1361). The reason for the rule was doubtless that in the "majority of cases" it measured "the extent of the loss of the shipper and of compensation for its breach, which it may be reasonably supposed *was in the contemplation of the parties at the time of making the contract*" (*id.* Sec. 1360) (Italics supplied). *A priori* if the parties have stipulated invoice value or value at point of shipment plus necessary expenses as the standard of value, that value would measure the extent of the loss and compensation for breach "which it may be reasonably supposed was in the contemplation of the parties at the time of the making of the contract." No other value to the shipper, it would seem, than invoice value could have been in contemplation of the parties to the contract, nor any other loss for breach of contract than such as would result from a failure to obtain that value.

As pointed out in our main brief, we believe that the validity of the clause as a reasonable modification of the carrier's common law responsibility was clearly established by the decisions in *Phoenix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 332; *Gulf, Colorado, &c., Ry.* v. *Texas Packing Co.*, 244 U. S. 31, 36-37, and *The Oneida*, 128 Fed. Rep. 687, 692 (certiorari denied 194 U. S. 632). However, even if it may be said that the question is an open one here, we submit that on principle and under the great weight of authority the clause may not be condemned as one exempting the carrier from liability on account of negligence.

A glance at the state court cases quoted in our main brief, pages 22-27, which give to similar clauses the construction adopted by the great majority of the state courts that have passed upon such a clause, not only negative it as one that provides "exemption from liability on account of negligence", but also hold it to be reasonable, and enforceable without the proffer of an alternative freight rate.

At page 23 of its brief respondent cites cases from four states which it is claimed hold the clause invalid "at least when no choice of rates is given". And at page 24, an excerpt from *Denver & R. G. R. Co.* v. *Peterson Grocery Co.*, 59 Colo. 125, is quoted, citing cases from the same states, including that of *Ruppel* v. *Allegheny Valley R. Co.*, 167 Pa. 166, representing the minority view that the clause is invalid where no choice of rates is given. It is to be noted in this connection that the Colorado Supreme Court refused to follow the minority view. Its conclusion as to the clause, after an extended consideration of the authorities, is summed up as quoted on page 24 of our main brief as follows,

> "as it appears to be recognized as valid in interstate shipments, and also has been held reasonable and valid when fairly and freely entered into, by a majority of the state courts which have heretofore passed

upon it in intrastate shipments, we are of the opinion that we should adopt the conclusion of the majority and hold it valid until the Supreme Court of the United States declares otherwise * * *".

The above decision was rendered at the January Term, 1915, (59 Colo. 1, 125). Thereafter in May 1917 this Court in *Gulf, Colorado &c. Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 36, construed and enforced a clause similar to the one under consideration in the *Colorado* case.

In an extended note in L. R. A. (1918 B), 720, 727, cases that have had the clause under consideration are collected and reviewed. The conclusion of the commentor is: "that the great majority of the courts uphold such a stipulation as merely providing a valid standard by which valuation shall be determined" (p. 721); that "the decided weight of authority is to the effect that a provision of this character is not a limitation of the carrier's common law liability * * * and does not require a reduced freight rate or other special consideration to sustain it" (p. 723); that "in fact, the great weight of authority is to the effect that such a provision is neither unreasonable in nature, nor against public policy" (p. 724).

Probably the most penetrating consideration of the clause is found in *Shaffer Co.* v. *Chicago, etc. R. Co.* (21 I. C. C. 8, 12) cited at page 22 of our main brief. In that case it was pointed out that the contract "makes no attempt to exempt the carrier from liability for the full value of the commodity transported, nor does it in any way limit the carrier's liability to a sum less than the value of the commodity". It was further pointed out that, although the contract "admittedly changes the common law rule which makes the carrier liable for the value of the property at place of destination", "it must be remembered that although the rule works to the advantage of the carrier when the market price has advanced

subsequent to the date of shipment, it benefits the shipper in case the market price at destination should decline; and it seems fairly probable that in the long run the rule would be of advantage to the shipper as often as to the carrier".

The principal cases in the state courts relied upon by respondent are the *Ruppel* case (*supra*) and *Straus* v. *Canadian Pacific Ry. Co.* (254 N. Y. 407), which we have already dealt with in our main brief. There is in the *Straus* case, as appears from the language respondent quotes, clearly nothing necessarily at variance with the intimation expressed in the *Kilthau* v. *International Mer. Marine Co.* (245 N. Y. 361) and respondent can hardly be serious in its statement at page 27, viz., that "it is a fair assumption that the Circuit Court of Appeals for the Second Circuit would attach at least as great weight to the decision in the *Straus* case as they attached to the intimation in the *Kilthau* case". Respondent emphasized the decision of the *Straus* case before the Circuit Court of Appeals and quoted from it extensively in its brief in that court. However, as pointed out in our main brief at page 28, that court ignored the *Straus* case as expressing any view different from, or inconsistent with, that expressed in the *Kilthau* case, the Court reaffirming its intimation as expressed in *The Merauke* (31 F. (2d) 974, 975) as coinciding with that expressed in the *Kilthau* case (R. pp. 195-196).

Respondent inaccurately states at page 20 that petitioner cited the language there quoted from *Chicago, etc. R. Co.* v. *McCaull-Dinsmore Co.* "as supporting the petitioner's argument that no choice of rates need be given to support a true valuation clause". Petitioner referred to the language in that case (see p. 12 of our main brief) as negativing any possible construction of clause Eleventh as a limitation of liability clause as defined in *The Merauke*, 31 F. (2d) 974, 975. In the latter case and also in *Kilthau* v. *International Mer.*

Marine Co., 245 N. Y. 361, 366, it was strongly intimated that if the agreement was mutually binding "to accept the invoice value (of the goods) as the measure of their value at port of destination", it would be valid without an alternative freight rate. Nor are we able to follow respondent's apparent inference, that, because the record in *Chicago, etc. R. Co.* v. *McCaull-Dinsmore Co.*, *supra*, may disclose an option as to shipment, that, therefore, the Court's favorable language in reference to the convenience and reasonableness of the clause must be attributed to this option, although the Court made no reference whatever thereto. Obviously, if the clause was reasonable on its face, the existence of the option might be further evidence of its reasonableness and still constitute no *sine qua non*. The clause declared invalid in *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317, as pointed out in our main brief, page 36, was one limiting liability to an arbitrary value within the definition of a limitation of liability clause, as defined in *The Merauke* (*supra*), and was held invalid, on its appearing that the shipper had been given neither an alternative freight rate nor other "compensating privilege".

At page 22 of its brief respondent disposes of the holdings in *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.* (*supra*), *Gulf, Colorado &c. Ry.* v. *Texas Packing Co.*, 244 U. S. 31, 36-37, (*supra*) and *The Oneida*, 128 Fed. Rep. 687, 689 (*supra*), with the statement that in those cases both parties were satisfied with the clause and the court did not pass on its validity. In support of this statement as to *The Oneida*, (*supra*) respondent quotes from the statement of the court at page 689, that "the commissioner commenced his computation by fixing the value of the cotton at the amount stated in the invoice" and that there was no exception "challenging its accuracy". That statement is clearly insufficient to support respondent's conclusion. It meant no more than that there was no dispute between the parties that the invoice value was the

same as "value or cost at time and place of shipment", as provided in the clause then under consideration. This fact is made abundantly clear a few lines further on, which respondent must have overlooked and in which the court said: "We start, therefore, with the assumption that the cost or value of the cotton at place of shipment *is correctly stated*" (Italics supplied). There was in that case clearly a dispute, which the court was called upon to determine, as to the amount of the shipper's damages and the carrier's liability resulting from the latter's negligence. In doing so the court upheld the clause, in the language quoted in our main brief at page 19, as one inserted in the bill of lading for the benefit of both parties and that under it the shipper's loss "was fairly measured by the difference between the cost or value of the goods at the time and place of shipment and their value in their damaged condition at place of delivery, together with expenses incurred for their transportation". If this were not sufficient to establish that the question as to the enforceability of the clause was at issue in that case we have the express statement relative thereto in the opinion of Judge Hough in *Duplan Silk Co.* v. *Lehigh Valley R. Co.*, 223 Fed. 600, 602, (who was counsel for appellant in *The Oneida,* as appears from 128 Fed. Rep. 687, 688). that "it was held to be a conventional substitution of the former value for the latter; the shippers *were estopped from using or claiming a higher value* * * *" (Italics supplied).

As to the two other cases, respondent advanced no factual basis whatever for its conclusion. And the very language of the opinions in those cases, as quoted at pages 19-21 of our main brief, negatives any reasonable basis for respondent's statement.

At page 11 of respondent's brief some attempt is made to deprecate the results of the application of the clause in a fantastically suppositious case where prices have fallen seventy-five per cent. during transit, and there

is apparent damage, resulting from negligent delivery by the carrier, as to only a small part of the commodity carried. Such a fortuitous situation would probably not happen once in a generation, and, if it did, it is difficult to see how it would prove anything of value. For the very same case thus imagined by the respondent would, with the premises changed only slightly, produce equally surprising results under the common law measure of damages, for the sanctity of which the respondent here argues.

Thus, let us suppose that, because of the negligence of the carrier in delivering the sugar at New York, the boat overturned and all of the bags, save one, were lost. The shipper under the common law rule of damages, which would measure his recovery by market value at destination, would recover but one-quarter of what he had actually paid for his sugar and would have suffered an actual loss of $1,500,000.

Or, again, let us suppose, that the market advances from 5 cents to 20 cents per pound during the course of the voyage and the bill of lading provides that, in case of loss or damage, the same shall be computed according to the common law or market value measure of damages with the entire shipment, instead of the individual bags, to be deemed the damaged unit and damages computed accordingly. Let us further suppose, as suggested by respondent, that by reason of negligence in the carrier's delivery of the sugar at New York one bag is dropped overboard and the rest delivered in perfect condition. In such event precisely the same result would follow as that envisaged by the respondent. Under the common law rule of damages, with the entire shipment treated as the unit rather than the individual bags, the shipper would be entitled to collect from the carrier as his damage the sum of $1,500,000 for an apparent loss of only one bag.

Thus, it is plain to see, that in unusual cases of the type supposed by the respondent, there may easily be a non-

compensable loss of $1,500,000 to the carrier or to the shipper, even in respect to the same shipment, whether the measure of damages applied be the common law or market value measure or whether the measure be that of invoice value; and this, too, whether the damaged unit be considered the shipment as a whole or the individual bags in the shipment.

It is obvious that where the equation used for resolving damage to dollars and cents involves one or more variables, the monetary result must vary with each individual case dependent upon the uncertain and unpredictable movement of the variables. The virtue of the damage formula that substitutes value at port of shipment for value on arrival at destination is, that it not only substitutes a known and constant factor for one of these unpredictable variables but also provides a measure of damages that can never produce an actual out of pocket loss to the shipper. Thus, it is to be noted, in all of the unusual types of cases above discussed, it is always the carrier that loses the one and a half million dollars when the invoice value is made the measure of the damages; never the shipper. It is only where the market value at destination serves as the damage basis, that the shipper may suffer such an actual out of pocket loss.

The point of respondent's criticism, thus, as pointed out at page 31 of our main brief, overlooks the ground upon which courts have justified their interference with freedom of contract in carrier cases, viz., to preserve and maintain the motive of the carrier to exercise care and diligence in the performance of its public duties (*Railroad* v. *Lockwood*, 17 Wall, 357, 377-378; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 440). We can conceive of no stronger incentive to the carrier for the faithful exercise of care and diligence in the performance of its duties than the fateful possibility suggested by respondent as a result of failure to do so. There has never been a hint in the books (and the usual statement is to the contrary) that a carrier may not by special stipulation under-

take a more stringent obligation than that which the law casts upon him. This is an age of keen competition in ocean carriage. The protection offered by clause Eleventh may have been the inducement, or one of the inducements, for the shipper's selecting petitioner as the carrier of the goods. Presumably in consonance with good accounting procedure, if it is its own insurer, the carrier has set up a proper reserve on its books to meet its contingent losses and this with or without the clause in question. And, whether it is its own insurer or secures its protection from others, clause Eleventh gives a measure of damages that at least provides the carrier in advance of shipment, with the elements whereby to forecast the worst that may befall him; just as it enables the shipper at the same time to assure himself that he shall in no event suffer a net loss on his venture, leaving as the sole element of uncertainty for him the precise extent of his possible profits.

The suggestion that the carrier might not be sufficiently solvent to meet the possible obligations that might be incurred under the clause, as also the other question as to the corporate powers of the carrier to undertake it, is too far-fetched for serious consideration. Presumably shippers investigate the financial solvency of a carrier to whom they entrust their goods. And even those few jurisdictions which have held similar clauses invalid have not even suggested lack of corporate power as a factor in their decision. The same fateful possibilities as to the carrier's liability exists under a clause that makes the value of the damaged goods the basis of adjustment as under a clause that makes the value of the entire shipment the basis. As pointed out in our main brief, at page 40, either method of adjustment may prove of advantage to the shipper and of detriment to the carrier, or *vice versa,* the difference in benefit or detriment between the methods being at most simply one of degree. The further intimation of respondent at page

10 that the form of bill here used was used by the carrier for the first time, presumably for this particular shipment, and may never be used again, would seem to merit no serious consideration.

POINT III.

The clause is a reasonable modification of the carrier's common law responsibility and the shipper having assented to it and enjoyed its protective benefits during transit may not repudiate it after the event of shipment shows it to have been to his advantage to do so.

In its Point IV respondent attempts to invoke the rule in *Railroad* v. *Lockwood* (*supra*). If the provision here involved were like the one in that case (an express provision stipulating against any liability for negligence) the petitioner would not be in this Court. Such a provision is unreasonable and in view of the public nature of the duties undertaken by the carrier the Court will assume that an assent to it was not freely given.

That the Court does not take this view, however, where the provision involved is simply a modification of the common law responsibility that would otherwise prevail, we pointed out in our main brief at pages 13-14. The same contention in substance as that which is here made was contended for in *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 430-431, viz., that a reduced rate or other consideration was a condition for any modification of common law liability, and that "both rates must be offered shipper and be reasonable, and the shipper be given a genuine freedom of choice in making a selection".

With such contention this Court expressly refused to agree, stating the sound rule and, as we believe, the rule to be applied here, as follows:

> "There can be no limitation of liability without the assent of the shipper, *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 344, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *Railroad* v. *Lockwood*, 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174. Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed".

The test as to validity here stated, it seems clear, is assent of the shipper expressed in the acceptance of the bill of lading and the reasonableness of the limitation provision. In consonance with such rule a provision in a bill, limiting the shipper's recovery in case of loss to a limited or agreed value, although arbitrary in amount, where the shipper had the option of shipping without such limitation at a higher rate, is upheld because it is "reasonable" that the charge for carriage should bear some relation to the responsibility undertaken. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491, 510). To say, however, that, because in this and like cases the limitation has been sustained, alternative rates are therefore a condition for sustaining limitations of common law liability is, it seems to us, to forsake the substance of the rule and follow its shadow.

We have already considered the reasonableness of the provision here involved.

To say that a mutually binding stipulation, that losses shall be adjusted on the basis of the invoice value of the goods plus expenses, is a stipulation against negligence, because, while that is the only value the goods had at the time of the agreement, it may chance that on delivery

they may have a higher value, is we submit a strained and unreasonable construction. The effect of the clause is no different in principle, it would seem, from one that values the subject matter of a contract or one that liquidates in advance the damages in case of breach of contract. And, as was pointed out by this Court in *Hart* v. *Pennsylvania Railroad Co.,* 112 U. S. 331, 341,

> "The subject matter of a contract may be valued, or damages in case of breach may be liquidated in advance."

The only judicial support for the contention, that the clause exempts the carrier from the consequences of its negligence, is the *Ruppel* case (*supra*) and the conclusion in that case, as we have pointed out in our main brief, at page 27, was predicated on assumptions that have no basis in fact. The reason for refusal to enforce the clause in other states following the minority view is perhaps typified by that of the Arkansas courts, which refuse to enforce any provision modifying the carrier's common law liability in the absence of a reduced rate and so hold invalid the common bill of lading exception against "breakage or leakage" where no reduction is given (*St. Louis, I. M. & S. Ry. Co.* v. *Caldwell,* 89 Ark. 218; 116 S. W. 210, 211).

That the shipper assented to the provision is clear. It not only accepted the bill but signed the contract (O. R. p. 139). Respondent suggests that because the bill of lading was in English and issued at an Italian port the shipper probably could not read it. It is a far-fetched possibility that a shipper engaged in the importing and exporting business (R. p. 149) could not read, and would sign any contract put before him. Furthermore, such possibility is negatived not only by the fact that the signer of the bill designated himself "The Shipper" in good English script, but also by the circumstance that there has never been a suggestion heretofore in the course of this litigation that the shipper was not entirely familiar with the provisions of the bill. And the cause of action here is based on contract, as evidenced by the bills of lading, which respond-

ent introduced in evidence as its own exhibits (O. R. ff. 4, 9-10; O. R. 139, Lib's. Exs. 1-3). The suggestion of ignorance obviously comes too late. As was pointed out in *Hart* v. *Pennsylvania R. R. Co.*, (*supra*),

> "The plaintiff did not in the course of trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued."

We submit in conclusion that there is no sound basis for refusal to enforce the clause here involved. Even if it may be upheld only in terms or on the basis of estoppel, estoppel is here. As was pointed out by Judge Hough in *Duplan Silk Co.* v. *Lehigh Valley R. Co.* 223 Fed. Rep. 600, 602, referring to a similar clause before the Court of Appeals in *The Oneida* (128 Fed. Rep. 128; certiorari denied 194 U. S. 632), the invoice value was but "a conventional substitution", for the market value at destination, as a proper measure of damages, and the shipper was "estopped from using or claiming" a measure other than that upon which he had thus agreed and by which he had thus been protected during the course of the transportation.

POINT IV.

The decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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